No. 50116-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ROBERT VANDERVORT, Appellant.

Appeal from the Superior Court of Mason County
The Honorable Daniel L. Goodell
No. 16-1-00351-6

BRIEF OF APPELLANT ROBERT VANDERVORT

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2. The State's closing argument, which misstated the law regarding unwitting possession, was error.
3. The State's closing argument, which impugned defense counsel, was error.
4. The State's closing argument, arguing that the jury must find the defendant more credible than the officers in order to find him not guilty, was error.
5. Defense counsel's failure to object to the State's closing argument, was error.
6. Defense counsel's failure to properly investigate and present a defense, was error.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is there sufficient evidence to convict a defendant of two counts of possession of a controlled substance when a scale in the defendant's pocket had residue of methamphetamine and heroin smeared on the scale, under the lid, and where defendant testified that he got the scale out of someone else's car, never opened the lid, and did not know there

were drugs on the scale?

2. Does the State commit flagrant and ill-intentioned misconduct when they misstate the law regarding unwitting possession, arguing that possession of a controlled substance is not unwitting if the defendant knew he possessed a scale, when the defense is that he did not know the scale had drugs on it?
3. Does the State commit flagrant and ill-intentioned misconduct when they impugn defense counsel, arguing that the entire defense is a distraction, when the defense is unwitting possession and there is no evidence that the defendant knew there was residue of drugs on the scale in his pocket?
4. Does the State commit flagrant and ill-intentioned misconduct when they argue that in order to find the defendant not guilty, they must find that the defendant is more credible than the officers, when the defense is unwitting possession?
5. Is defense counsel ineffective when they fail to object to the State's improper closing argument, which misstates the law regarding unwitting possession, impugns defense

counsel, and argues that in order to find the defendant not guilty, the jury must find that the defendant is more credible than the officers?

III. STATEMENT OF THE CASE

Vandervort was originally charged with one count of unlawful possession of a controlled substance – methamphetamine. CP 165-66. The first trial ended in a mistrial, after the jury was unable to reach a verdict. RP1 180, CP 84. After a second trial, Vandervort was convicted of two counts of unlawful possession of a controlled substance, methamphetamine and heroin. RP2 424. He appeals his convictions.

1. Facts.

On July 30, 2016, the Olympia Police Department contacted the Mason County Sheriff's office to assist with an investigation of two men using counterfeit money to purchase items at yard sales. RP2 233-34. Olympia Police provided a vehicle description and license plate; that vehicle was registered to an address in Mason County. RP2 234. When police arrived, Vandervort was standing outside and then ran into the house. RP2 234-35. Vandervort testified that he went in the house because he had a department of corrections (DOC) warrant and didn't want to be arrested. RP2 367. Police spoke to the home owner, learned Vandervort's name, and that he had a warrant for his arrest. RP2 236.

The police located Vandervort inside the house and arrested him. RP2 238.

Vandervort testified that he got a call from a friend's son, saying that his mom had been arrested, so he went to pick up her white Acura. RP2 362-63. When he picked up the car, there was stuff everywhere, the keys were under the seat, and there was a scale inside, which he put in his pocket. RP2 363. He never opened the scale or looked inside. RP2 366.

After Vandervort was arrested, he was searched. RP2 239. Police found a digital scale in Vandervort's pocket. RP2 239. The officer testified that scales are commonly associated with drugs. RP2 240. The officer opened the lid that covered the scale and then saw a white crystal substance. RP2 239. There was a small amount of the white crystal substance, but it was visible after the lid was removed. RP2 241, 255. At the time, the officer did not notice brown substances or anything that resembled heroin on the scale. RP2 254. A field test was positive for methamphetamine. RP2 240.

The officer testified that it is common to find drugs and drug paraphernalia associated with scales. RP2 264. However, police did not locate any drugs, paraphernalia, or other illegal items in the house or on Vandervort. RP2 264, 326, 339.

Police reported taking photos of several items, including the scale,

but there were no photos taken of the scale. RP2 264-265. Deputy Cotte was listed on the evidence bag for the scale, but he was not involved in the investigation in any way. RP2 249.

Later, police obtained search warrant for a white Acura at the property. RP2 267. They seized items from the yard sales in the vehicle. RP2 338.

The crime lab technician testified that there was a small amount of residue smeared on the scale; she estimated it was less than one tenth of a gram. RP2 310. There was not enough residue to remove it from the scale and weigh it. RP2 310. The residue was tested and it contained heroin and methamphetamine. RP2 305. No one ever saw Vandervort open the lid to the scale. RP2 255.

At trial, Vandervort's prior convictions for possession of methamphetamine from 2005 and 2012 were admitted. RP2 371-72. He testified that he used methamphetamine in the past, but never heroin, and that he had not used since 2013. RP2 370-71. He testified that drugs are normally kept in a bag, not a scale, and he had no reason to suspect there may be drugs on the scale. RP2 369-70.

2. Closing Arguments.

The State argued that the possession was not unwitting because Vandervort knew he had a scale and he knew what methamphetamine

was; the State did not address whether or not Vandervort knew there was methamphetamine on the scale:

> [T]here are two ways that you get to an unwitting possession defense, and they're laid out. Didn't know that I had it, or didn't know what it was. Well, he knew that he had it. He indicated as much on the stand. And his prior criminal history possessing methamphetamine, that indicates that he knew what it was. And the heroin too in that particular case.

RP2 404.

The State also argued that the defense was a distraction:

> Really the entire defense in this particular case, and getting up and admitting to something else, it's really kind of a distraction technique. It's somewhat reminiscent of sitting around the dinner table, your kids and dad comes in and says, Michael, I see that you got an F in algebra. Well that may be true, dad, but Mark is smoking pot. It doesn't mean that Michael didn't get an F in algebra. It's just admitting to something else as a distraction and confusion technique. Especially when there's no other charge.
> There's nothing dealing with stolen property. That's just really foundation as to how they came into contact with Mr. Vandervort.

RP2 417-18.

The State also argued that the jury could only find Vandervort not guilty if they found him more credible than the officers:

> [T]o not find him guilty in this particular case because the evidence and the weight of it is so stacked against him, you would have to find Mr. Vandervort's testimony more credible than that of the officers.

RP2 404-05.

IV. ARGUMENT

1. There Was Insufficient Evidence to Convict Vandervort of Possession of a Controlled Substance Because No Rational Trier of Fact Could Have Found That Vandervort Failed to Prove Unwitting Possession by a Preponderance of the Evidence.

"The standard for determining whether a conviction rests on insufficient evidence is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011) (internal citations omitted). "The due process clause of the fourteenth amendment to the United States Constitution requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged." *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983); U.S. CONST. amend. XIV.

In this case, the State had the burden to prove beyond a reasonable doubt that Vandervort unlawfully possessed two controlled substances: heroin and methamphetamine. RCW 69.50.4013; CP 42, 44, 92-93.

However, a defendant is not guilty of possession of a controlled substance if he establishes by a preponderance of the evidence that he "did not know the substance was in his possession or did not know the nature of the substance." *State v. Staley*, 123 Wash. 2d 794, 799, 872 P.2d 502,

505 (1994); CP 45.

> When reviewing a challenge to the sufficiency of evidence based on an affirmative defense with that standard of proof, the inquiry is whether, considering the evidence in the light most favorable to the [state], a rational trier of fact could have found that the accused failed to prove the defense by a preponderance of the evidence.

City of Spokane v. Beck, 130 Wash. App. 481, 486, 123 P.3d 854, 857 (2005) (reversing DUI conviction because no rational trier of fact could have found that defendant failed to prove safely off the roadway affirmative defense by a preponderance of the evidence), citing *State v. Lively*, 130 Wash.2d 1, 17, 921 P.2d 1035 (1996). Therefore, there is insufficient evidence to convict Vandervort if no rational trier of fact could have found that he failed to prove unwitting possession by a preponderance of the evidence.

In Washington, there is no minimum quantity of a controlled substance required for a conviction and there is no knowledge element for possession of a controlled substance. However, knowledge is relevant to the defense of unwitting possession.

Other states consider the quantity of a controlled substance present in determining a defendant's knowledge that they are in possession of a controlled substance. *See People v. Theel*, 180 Colo. 348, 350, 505 P.2d 964, 965–66 (1973) (marijuana conviction reversed where defendant

possessed trace amounts of marijuana in his pocket because insufficient to prove that he knowingly possessed marijuana); *State v. Dempsey*, 22 Ohio St. 2d 219, 222, 259 N.E.2d 745, 748 (1970) (no knowledge presumed where cocaine found in lint in pocket); *People v. Leal*, 64 Cal. 2d 504, 511, 413 P.2d 665, 670 (1966) (knowledge of possession unlikely where heroin residue found on spoon). This court should consider the fact that only trace amounts of methamphetamine and cocaine were present on the scale in determining whether any rational fact finder could have found that Vandervort failed to prove unwitting possession by a preponderance of the evidence.

In this case, there were trace amounts of methamphetamine and heroin on the scale in Vandervort's pocket. The substance was visible only if the scale cover was removed. It was estimated that there was one tenth of a gram on the scale, but the amount was too small to weigh. In order to test the substance, it was scraped off of the scale. There was testimony that the officer originally only observed what he believed to be methamphetamine on the scale; he did not observe or suspect heroin at the time. And, while there was evidence that Vandervort had previously used methamphetamine, there was no evidence he had ever used herion.

Vandervort knew the police were looking for him, he had time to enter the house, hide under a bed, and never attempted to get rid of the

scale, which one would likely do if they knew it contained an unlawful controlled substance. Vandervort testified that he got the scale out of friend's car, he never opened it or looked inside. Significantly, there was no other drug paraphernalia, drugs, or related items found on Vandervort, in the vehicle searched, or in the house.

Given the trace amount of residue stuck to the scale, that it was only visible if the lid was removed, that Vandervort testified that he got the scale out of a friend's car, that there was no other evidence of drug use or possession, and Vandervort's testimony that he did not know there were drugs on the scale, no rational finder of fact could find that Vandervort failed to prove unwitting possession by a preponderance of the evidence. Therefore, the convictions should be reversed and dismissed.

2. Prosecutorial Misconduct.

A claim of prosecutorial misconduct can be raised and considered for the first time on appeal if the prosecutor's actions "were 'so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.'" *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988) (internal citations omitted). An argument is flagrant and ill-intentioned when those same arguments have been held improper in a published opinion. *State v. Johnson*, 158 Wash. App. 677, 685, 243 P.3d 936, 940 (2010).

"Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial." *In re Glasmann*, 175 Wash. 2d 696, 703-04, 286 P.3d 673, 677 (2012); *State v. Davenport,* 100 Wash.2d 757, 762, 675 P.2d 1213 (1984); *see also* WASH. CONST. art I, § 21, U.S. CONST. amend. VI, XIV. A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the conduct was improper and that it prejudiced his defense. *State v. Harvey*, 34 Wn. App. 737, 740, 664 P.2d 1281 (1983), *review denied,* 100 Wn.2d 1008 (1983). A defendant's constitutional right to a fair trial is violated when there is a substantial likelihood that improper comments affected the jury's verdict. *State v. Jungers*, 125 Wn. App. 895, 106 P.3d 827 (2005).

a. *The State Misstated the Law Regarding Unwitting Possession.*

A defendant is denied a fair trial when the prosecutor mischaracterizes the law and there is a substantial likelihood that the misstatement affected the jury verdict. *State v. Gotcher*, 52 Wash. App. 350, 355, 759 P.2d 1216 (1988). A prosecutor's misstatement of the law is a serious irregularity having the grave potential to mislead the jury. *Davenport*, 100 Wash.2d at 764. Misstating the law, especially regarding a key issue in the case, is likely to affect the verdict. *See State v. Allen*,

182 Wash. 2d 364, 375, 341 P.3d 268, 273 (2015) (reversed when State misstated accomplice liability in closing).

As stated above, unwitting possession is an affirmative defense to possession of a controlled substance. Vandervort is not guilty of possession of a controlled substance if he establishes by a preponderance of the evidence that he "did not know the substance was in his possession or did not know the nature of the substance." *Staley*, 123 Wash. 2d 794, 799; CP 45. The State misstated the law regarding unwitting defense by arguing that Vandervort was guilty because he knew that he had the scale and he knew what methamphemine was from his prior conviction, and he knew what heroin was.

> [T]here are two ways that you get to an unwitting possession defense, and they're laid out. Didn't know that I had it, or didn't know what it was. Well, he knew that he had it. He indicated as much on the stand. And his prior criminal history possessing methamphetamine, that indicates that he knew what it was. And the heroin too in that particular case.

RP2 404. However, the question for the jury was not whether or not Vandervort knew he had a scale, but whether or not he knew there was methamphetamine and heroin on the scale.

Although this argument was not objected to at trial, this court should consider it for the first time on appeal because the prosecutor's misstatement of the law was flagrant and ill-intentioned and likely affected

the verdict. As stated above, the misstatement of the law is a serious irregularity. The key issue in this case was whether or not Vandervort knew he was in possession of a controlled substance, where there were only trace amounts of drugs smeared on the scale, which was covered with a lid, and no other evidence that he knew he was in possession of a controlled substance. The misstatement of the law is flagrant and ill-intentioned because it is a serious irregularity and likely misled the jury. Unwitting possession is a complicated legal principal, and a curative instruction may not have been sufficient to unring the bell for the jury regarding knowledge of possession of the scale versus the drugs on the scale, once the State improperly stated the law.

Given that unwitting possession was the defense in this case, the misstatement was extremely prejudicial. Improperly arguing that Vandervort could not establish unwitting possession because he knowingly possessed the scale, a misstatement of the law, likely effected the verdict in this case. Therefore, the conviction should be reversed.

b. *The State Improperly Impugned Defense Counsel.*

It is improper for the State to impugn defense counsel. "Prosecutorial statements that malign defen[s]e counsel can severely damage an accused's opportunity to present his or her case and are therefore impermissible." *State v. Lindsay*, 180 Wash. 2d 423, 432, 326

P.3d 125, 130 (2014), quoting *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir.1983) (per curiam). It is improper for the State to argue that defense counsel is using slight of hand or argue that the defense theory is a "crock." *State v. Thorgerson*, 172 Wash. 2d 438, 451, 258 P.3d 43, 50 (2011); *Lindsay*, 180 Wash. 2d at 433.

The State improperly argued that "the entire defense" was a "distraction technique." RP2 417-18. Although this argument was not objected to, this court should consider it for the first time on appeal because it was flagrant and ill-intentioned. Similar arguments have been found to be flagrant and ill-intentioned. *Thorgerson*, 172 Wash. 2d 438 ("sleight of hand"). A curative instruction would have been insufficient to unring the bell after the State improperly stated to the jury that the entire defense was a distraction. This was highly prejudicial because the entire defense in this case was unwitting possession, there were trace amounts of residue on a scale, under the lid, and no other evidence that indicated Vandervort knew there were drugs on the scale. Therefore, the misconduct, calling the entire defense a distraction, likely affected the verdict in this case.

c. *The State Improperly Argued That to Find Vandervort Not Guilty, They Were Required to Find Him More Credible Than the Officers.*

It is improper for the State to argue that in order to find the defendant not guilty, the jury must find that the officers or other witnesses are lying. *State v. Barrow*, 60 Wash. App. 869, 875–76, 809 P.2d 209, 213 (1991). Such arguments constitute misconduct. *Id.* In this case, the argument was not objected to. However, this court should consider it for the first time on appeal because the argument is flagrant and ill-intentioned as it is contrary to established law and a misstatement of the law. The jury could have found the officers credible and found that Vandervort did not know there were drugs on the scale, and in that case, they would have been required to find Vandervort not guilty. A curative instruction may not have cured the error after the State improperly placed the idea of weighing the credibility of the officers versus Vandervort in the jurors' minds. Given that this entire case relied on an unwitting possession defense and the lack of evidence that Vandervort knew there was drug residue on the scale, this misstatement of the law likely affected the verdict.

4. Vandervort Received Ineffective Assistance of Counsel.

To establish ineffective assistance of counsel, the defendant must establish that his attorney's performance was deficient and the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988).

a. *Defense Counsel Failed to Object to the State's Improper Closing Arguments.*

As argued above, in closing argument, the State improperly misstated the law regarding unwitting possession, impugned defense counsel, and argued that in order to find Vandervort not guilty, the jury had to find Vandervort more credible than the officers. For the reasons stated above, each of these arguments was improper and an objection would have likely been successful. Because these arguments were improper and prejudicial, as argued above, there was no strategical reason for failing to object. And, for the reasons stated above, objections would likely have been

successful. Counsel's failure to object denied Vandervort of effective assistance of counsel and likely affected the verdicts in this case.

b. *Defense Counsel Failed to Properly Investigate and Present a Defense.*

Counsel's failure to call witnesses based on lack of investigation and preparation may constitute ineffective assistance of counsel.

> The decision whether to call a witness is generally presumed to be a matter of trial strategy or tactics. But this presumption may be overcome by showing that the witness was not presented because counsel failed to conduct appropriate investigations.

State v. Weber, 137 Wash. App. 852, 858, 155 P.3d 947, 950 (2007), citing *State v. Thomas*, 109 Wash.2d 222, 230, 743 P.2d 816 (1987). "The duty to provide effective assistance includes the duty to research relevant statutes." *State v. Estes*, 188 Wash. 2d 450, 460, 395 P.3d 1045, 1050 (2017); *In re Pers. Restraint of Yung-Cheng Tsai*, 183 Wash.2d 91, 102, 351 P.3d 138 (2015).

In this case, the defense was unwitting possession. It is clear that defense counsel's strategy was to show the jury that Vandervort's friend had been arrested the previous day on drug charges, police searched the car for contraband, Vandervort picked up the car, retrieved the scale, and because the police searched the car for drugs and paraphernalia, he had no

reason to believe drugs were on the scale. RP 16-20, 106, 108-09. Defense counsel planned to call witnesses who were present during the arrest and search in Olympia, however, one was represented by counsel and he did not know that she was represented, had not spoken to her or her attorney prior to trial, and the witnesses did not appear for trial. RP 16-22, 35-36. During the first trial, defense counsel tried to elicit this information from Officer Anderson. RP 112-113. Counsel also tried to elicit this information from Vandervort, but most of it was excluded as hearsay. RP 124-27.

At the second trial, defense counsel again tried to introduce evidence that the vehicle that Vandervort got the scale from had been the subject of a drug arrest and search the day prior in Olympia, involving other parties. RP2 268-278. The State argued that defense counsel's questions were hearsay. RP2 274. The State argued, "If [defense counsel] wants to go through that particular line of questioning, then he can subpoena witnesses, he can subpoena the officers that searched this vehicle and have them come in to testify to that." RP2 274. Defense counsel did not call any of the officers from Olympia who were involved in the arrest or search of the vehicle in Olympia as witnesses in this case. Instead, counsel attempted to elicit the testimony from the State's witness, Officer Anderson, who had no knowledge of the incident. RP2 267.

Defense counsel was able to get some of the information in through Vandervort. RP2 362-63.

It is clear from the record that defense counsel did not interview at least one potential defense witness, although counsel may not have been able to locate her; however, defense counsel was not even aware that she had pending charges, was represented by counsel, and did not attempt to contact her attorney. More importantly, defense counsel did not adequately review the hearsay rules and incorrectly assumed counsel would be able to elicit the information about the vehicle involved in the arrest in Olympia through the State's witnesses. Defense counsel either did not interview the officers, or did not do so thoroughly, because the officers who testified for the State had no knowledge of the arrest that occurred in Olympia. It appears that defense counsel never interviewed or subpoenaed the officers actually involved in the search. And, defense counsel did nothing to correct these issues between the first and second trials. The lack of investigation and preparation constitutes ineffective assistance of counsel.

Vandervort was prejudiced by his counsel's failure to properly investigate, research, and prepare for trial because this was a case that involved unwitting possession, a trace amount of residue, no other evidence that he knew he was in possession of two controlled substances,

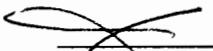
and, therefore, evidence that the scale came from a vehicle that had been the subject of an arrest and search the day before, would have likely affected the verdict.

V. CONCLUSION

In conclusion, there was insufficient evidence to convict Vandervort. Therefore, these convictions should be reversed and dismissed. In the alternative, this court should reverse and remand for a new trial because Vandervort was denied a fair trial due to prosecutorial misconduct and ineffective assistance of counsel.

Dated this 18th day of September, 2017.

Respectfully Submitted,



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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, vs. ROBERT VANDERVORT, Appellant.	NO. 50116-3-II CERTIFICATE OF SERVICE

The undersigned certifies that on this day correct copies of this appellant's brief were delivered electronically to the following:

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The undersigned certifies that on this day correct copies of this appellant's brief were delivered by U.S. mail to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.

Signed September 18, 2017 at Tacoma, Washington.

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